

1996

DECISION DOCUMENT

10 Dec

NATIONWIDE PERMIT NO.2

This document constitutes the Environmental Assessment and Statement of Findings for the Nationwide Permit (NWP) described below.

1. STRUCTURES IN ARTIFICIAL CANALS. Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

General conditions of the NWP are contained in the Federal Register. Notification requirements, additional conditions, limitations and restrictions are contained in 33 CFR Part 330.

2. STATUTORY AUTHORITY:

- (a) Section 10 of the Rivers and Harbors Act of 1899
(33 U.S.C. 403)

3. COMPLIANCE WITH RELATED LAWS (33 CFR 320.3):

- (a) General:

NWPs are a type of general permit designed to regulate certain activities that have minimal adverse impacts and generally comply with the related laws in 33 CFR 320.3. Potential adverse impacts and compliance with the laws in 33 CFR 320.3 are controlled by the terms and conditions of each NWP, additional provisions, and the review process that is undertaken prior to the issuance of NWPs and through PCNs when required by this NWP.

- (b) Terms and Conditions:

Specific general conditions of all NWPs provide for a case-by-case review of activities that may adversely affect endangered species or historic properties. Certain NWPs also have a notification requirement that will trigger a case-by-case review of particular activities. Another condition prohibits use of NWPs for

activities that are located in wild and scenic rivers. None of the NWP's authorize artificial reefs.

In some cases, activities authorized by a NWP may require other Federal, state or local authorizations. Examples of such cases include but are not limited to: activities that are in or affect marine sanctuaries or marine mammals; the ownership, construction, location and operation of ocean thermal energy conversion facilities or deepwater ports beyond the territorial seas; or the transfer of a lot in a subdivision that is part of a project that requires a DA permit. In such cases, a provision of the NWP's specifies that the NWP does not obviate the need to obtain other authorizations required by law. [33 CFR 330.4(b)]

To further ensure that effects will be minimal, whenever, this NWP is combined with any NWP 12 through 40 a Corps-only PCN is required. The Corps will review such combinations of NWP's to ensure that the individual or cumulative effects are minimal. The Corps believes that combinations of any NWP 1 through 11 which does not already require a PCN, will result in minimal individual and cumulative effects. Therefore, no PCN would be necessary for the stacking of such NWP's.

An additional safeguard is a provision that allows the Chief of Engineers, division engineers and/or district engineers to: assert discretionary authority and require an individual permit for a specific action; modify NWP's for specific activities by requiring special conditions on a case-by-case basis; add special conditions on a regional basis for certain NWP's; or take action to suspend or revoke an NWP. [33 CFR 330.4(e) and 330.5]

(c) Review Process:

The analyses contained in this document and coordination that will be undertaken prior to the issuance of all NWP's will fulfill the requirements of the National Environmental Policy Act, the Fish and Wildlife Coordination Act and other acts promulgated to protect the quality of the environment.

All NWP's that authorize activities which may result in a discharge into waters of the U.S. require a 401 water

quality certification. NWP's that authorize an activity within, or affecting land or water uses within a state that has a Federally approved coastal zone management program must also be certified as being consistent with the state's program. The procedures for compliance of NWP's with these laws are contained in 33 CFR 330.4(c) and (d), respectively.

(d) Public Comment and Response:

For public comment and response see the preamble to the Federal Register notice issuing the Final NWP's.

4. INDIVIDUAL AND CUMULATIVE IMPACTS:

(a) General evaluation criteria:

This evaluation constitutes the public interest review specified in 33 CFR 320.4 (a)(1) and (2), including environmental considerations of the National Environmental Policy Act and the impact analysis specified in Subparts C-F of the 404(b)(1) Guidelines (40 CFR 230).

The evaluation criteria that are relevant to this particular NWP are identified in the following matrixes.

The determination that a particular factor is relevant or not is based upon consideration of the direct and indirect impacts that can be reasonably attributed to the authorized activity.

Because NWP's authorize activities on a nationwide basis, it is difficult to predict all of the indirect impacts that may be associated with each individual action. For example, the NWP for a road crossing may be used to fulfill a variety of project purposes. Indication that a factor is not relevant to a particular NWP does not necessarily mean that the NWP would not have an effect on such factor(s), but that it is a factor not readily identified with the authorized activity. In any case, adverse effects will be controlled by the terms, conditions and additional provisions of the NWP. For example, Section 7 consultation will be required for activities that may adversely affect endangered species.

In other cases, factors may be relevant, but have negligible impacts for example, the impacts of a boat

ramp on flood plain values, water level fluctuations or flood hazards.

Factors identified as being relevant, to the extent that potential impacts of the activity determined the terms and conditions of a NWP, are discussed at the end of the matrixes.

(b) NEPA Alternatives:

This evaluation includes an analysis of alternatives based upon National Environmental Policy Act requirements which require a more expansive review than the section 404(b)(1) Guidelines. The alternatives discussed below are based upon an analysis that indicates the potential environmental effects as well as impacts to the Corps, public, Federal and State resource agencies, and permit applicants.

(i) No Action Alternative (no nationwide permit):

The no action alternative would not achieve the goals of the Corps nationwide permit program to reduce the regulatory burden on applicants for activities that would result in no more than minimal adverse environmental effects. The no action alternative would take resources away from the Corps ability to pursue the current level of review for other activities with more environmental effects. This includes individual permits that result from the Corps taking its discretionary authority under the nationwide permit program. In the absence of this nationwide permit, Department of the Army authorization in the form of another general permit (regional or programmatic general permit (where appropriate)) or individual permits would be required. Corps district offices would most likely attempt to develop a regional general permit in lieu of a nationwide permit but this is an inefficient method and not practicable for the development of a general permit for activities that have applicability across the Nation. Not all districts would develop the regional general permit for a variety of reasons. This would result in an inconsistent establishment of regional general permits and create situations where similar activities with minimal impacts would be evaluated differently, potentially within the same state. In addition, the resources necessary for the

Corps to evaluate activities through an individual permit review, and the resources necessary for the public and Federal and State resource agencies to review and comment, would be overly burdensome for the numerous public notices that would result from not issuing this nationwide permit along with the other NWP's. As an example, when the Corps publishes a public notice for proposed activities that result in no more than minimal adverse environmental effects, the Corps typically does not receive responses to our public notices from either the interested public or Federal and State resource agencies. One other highly beneficial aspect of the nationwide permit program that would not be achieved through the no action alternative has been the desire of applicants to design activities that will meet the terms and conditions of a nationwide permit. We believe the NWP's have reduced environmental impacts significantly because most applicants modify their project to use the NWP's in an effort to avoid the delays and costs typically associated with the evaluation of an individual permit application.

(ii) National Modification Alternatives:

Since the Corps nationwide permit program began in 1977, we have continuously strived to develop nationwide permits that will cause no more than minimal adverse environmental effects for use throughout the Nation. We have developed the terms and conditions of this nationwide permit based upon this experience, including comments from the public and Federal and State resource agencies. The Corps is constantly reevaluating the potential impacts of activities covered under nationwide permits, and every five years, at a minimum, reevaluating the nationwide permits. As a result, the Corps has considered both decreases and increases in the scope of work for this nationwide permit and has determined that other alternatives are not practicable nor reasonable either from an environmental impact standpoint or from the effects associated with evaluating additional individual permits for activities.

(iii) Regional Modification Alternatives:

Corps divisions and districts will monitor and analyze the impacts of the nationwide permits and, if warranted,

regionally condition this nationwide permit to ensure that no more than minimal adverse environmental effects result. In some cases districts will revoke the use of the nationwide permit based upon the potential for unacceptable adverse environmental effects (e.g., high value or unique wetlands) to occur even though the terms and conditions of the permit may be met.

(iv) Case specific on-site alternatives:

While thresholds have been developed for each nationwide permit, on-site alternatives will be considered for activities requiring a PCN further ensuring that this nationwide permit will result in no more than minimal adverse environmental effects. The PCN evaluation by the Corps may find that further conditioning of the nationwide permit for a specific activity, including relocating or further reduction of the impacts of the activity and/or compensatory mitigation, is necessary or that the project should be evaluated under the Corps individual permitting procedures. Specifically, if the Corps district determines that a proposed activity will have more than minimal adverse environmental effects on a high value aquatic resource, they may require an individual permit. This would result in a project specific alternatives analysis, including off-site alternatives, where high value aquatic resources are involved.

(c) Public interest review (320.4(a)(1)):

<u>FACTOR:</u> <u>ACTION:</u>	<u>RELEVANT TO THIS</u>	
	YES	NO
<u>Conservation</u>		X
<u>Economics</u>	X	
<u>Aesthetics</u>	X	
<u>General environmental concerns</u>		X
<u>Wetlands</u>	X	
<u>Historic properties</u>	X	
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Fish and wildlife values		X
— Flood hazards		X
— Flood plain values		X
— Land use	X	
— Navigation	X	
— Shore erosion and accretion	X	
— Recreation	X	
— Water supply and conservation		X
— Water quality	X	
— Energy needs		X
— Safety	X	
— Food and fiber production		X
— Mineral needs		X
— Considerations of property ownership	X	

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(d) Impact analysis (Subparts C-F):

<u>FACTOR:</u> <u>ACTION:</u>	<u>RELEVANT TO THIS</u>	
	YES	NO
Substrate	X	
— Suspended particulates/turbidity	X	
— Water	X	
— Current patterns/water circulation		X
— Normal water level fluctuations		X
— Salinity gradients		X

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Threatened and endangered species	X
Aquatic food web	X
Wildlife	X
Special aquatic sites	X
Municipal and private water supplies	X
Water related recreation	X
Aesthetics	X
Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas	X

(e) Potential impacts:

(i) General:

As specified by the description of the NWP, structures may be constructed in artificial canals. Docks, piers and boathouses typically accommodate watercraft such as rowboats, sailboats, outboard and inboard powerboats. Associated activities such as dredging, installation of a small boat ramp may be authorized by multiple use of NWPs or regional permits issued by division or district engineers. The related work must meet the terms and conditions of the specified permit(s) (i.e. 20 cubic yards of dredging, etc.). If construction and use of the structures is dependent on portions of a larger project that requires an individual permit, the NWP will not apply. [See 33 CFR 330.6 (c) and (d)]

(ii) Physical, chemical and biological characteristics of the aquatic ecosystem:

The land area around artificial canals within which this NWP applies is comprised of either private residences or multi-unit housing facilities. The canals themselves are subject to frequent use for recreational boating which causes wave wash and other general stress of the waters

and aquatic organisms in the canals. The canals exist as a result of private action by non-Federal interests and under the authority of previous authorizations.

Construction of structures may require the placement of piling. Piling are typically placed by jetting or driving them into place. In some instances holes may have to be drilled or augered into hard substrate prior to placement of the piles. Equipment used during this phase of the construction may vary from hand held tools to heavy mechanical equipment. During construction fish and other motile aquatic organisms will most likely avoid the area until the work is complete. If the piling are driven into place the benthic organisms directly in the path of the piling would be destroyed. Likewise, it is likely that immotile organisms in the path of a drill or auger would be destroyed. If the piling are jetted into place the benthic organisms would be jetted away from the path of the piling but may be smothered when suspended material settles to the bottom.

In many instances fixed piers or docks could be constructed over wetlands. Depending on the method of construction, wetland vegetation could be damaged during construction. However, the vegetation would be expected to recover soon after construction or over the next growing season. Some shading of the wetland vegetation would occur as the result of the construction of the structure. This impact is expected to be minor.

Depending on the method of construction with the appropriate sediment and erosion controls, equipment used, composition of the bottom substrate, and wind and current conditions during construction, material that is suspended in the water column will temporarily increase the turbidity of the water. The plume generated by the turbidity will normally be limited to the immediate vicinity of the disturbance and will dissipate shortly after this phase of the construction is complete.

Depending upon the type of materials used to construct the structures, sessile organisms as well as other aquatic organisms may colonize submerged surfaces over time. Pier and dock structures often provide habitat for various sessile and motile invertebrates as well as provide shelter, shade, and feeding areas for various

fish and other aquatic organisms.

Construction and use of the structures may result in the discharge of small amounts of gas, oil and grease from inboard and outboard motors. The frequency and concentration of these discharges will depend on the number of power boats associated with these structures.

Boaters using the structures may also litter the waterway with debris. Any use of the waterway by the public is likely to result in some littering. The degree of impact will depend upon the location of the structures and values of the public using the waterway.

The NWP contains general conditions that will trigger special procedures for activities that may adversely affect historic properties, endangered species or marine sanctuaries.

(iii) Effects on human use characteristics:

The construction of structures in artificial canals may alter the visual character of the general area. The extent and perception of the alteration will vary depending upon the nature of the surrounding area and values of the public using or viewing the facilities. The presence of the artificial canal and adjacent structures represents visual impacts which have already affected the natural character of the area.

The issuance of a NWP to construct structures could have a positive impact on the local economy. Construction would generate jobs and revenue for contractors and building supply businesses. It may also generate sales at local marine service and other retail stores. The NWP will also provide the public with a form of authorization that can be obtained with little delay and paperwork.

The construction of the structures will provide the public with a means by which they can gain safe access to waterways for recreational use.

(iv) Cumulative Impacts:

Cumulative impacts of the NWP generally do not depend on the number of times the permit is used on a national

basis but on the number of times this NWP and other permits are used within a geographic area. Within a geographic area (e.g., a specific watershed) it may be determined that the cumulative effects of NWPs have more than minimal adverse effects. The division engineer and the district engineer will monitor and review geographic areas that may have cumulative impacts that are more than minimal. The division engineer and the district engineer have the authority to require individual review of projects or to require special conditions to the permit either on a case-by-case basis or on a regional basis where cumulative impacts are determined to be more than minimal. When a division engineer or district engineer determines that a geographic area may have cumulative impacts that are more than minimal they will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision they will compile information on the cumulative adverse impacts and supplement this document.

Based upon a survey of division and district offices, we estimate approximately 10900 acres of impacts nationally from all NWPs with approximately 7800 acres of wetland mitigation. We expect that this NWP may be used to authorize approximately 1100 structures per year on a national basis. Of these approximately 4 structures will have wetland impacts of approximately .2 acres of wetland. The demand for these types of activities could increase or decrease over the five year duration of this NWP. Using the current trend approximately 5600 structures could be authorized over a five year period with wetland impacts of approximately 1 acre. We expect that the time savings associated with the use of this NWP will encourage applicants to design their project within the scope of the permit rather than request an individual permit which could have a greater adverse impact.

Cumulative impacts of this NWP will depend upon whether or not the use of the permit results in increased numbers of structures constructed. We do not expect the NWP to increase the number of structures built in artificial canals which are presently authorized by other general permits or individual permits. Increased numbers of piers and docks and other structures may not be aesthetically pleasing. The number of boaters using the waterway could increase. Increased use of the waterway

could result in increased discharge of pollutants such as petroleum products and litter.

(f) Additional Public Interest Review Factors 33 CFR 320.4(a)(2):

(i) Relative extent of the public and private need for the proposed structure or work 33 CFR 320.4(a)(2):

The use of the NWP for structures in artificial canals is a means by which the public can gain access to the waterways for recreational purposes.

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work:

The objective of the proposed action is to develop a permit, that is readily obtained by the public and authorize an activity that has minimal adverse effects on the aquatic environment and overall public interest.

Most situations in which there is an unresolved conflict as to resource use, arise when environmentally sensitive areas are involved (e.g. special aquatic sites, including wetlands) or there are competing uses of a resource (e.g. use of a waterway for commercial versus recreational purposes). The nature and scope of the proposed action as well as the terms and conditions of the NWP minimize the likelihood of such a conflict. In the event that there is a conflict, the NWP contains provisions that are capable of resolving the matter (see sections 1 and 3 of this document).

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited:

The nature and scope of the work authorized by the NWP will most likely restrict the extent of the beneficial and detrimental effects to the area immediately surrounding the activity. Most detrimental effects are associated with construction and will be short term. Unless the structure is removed, a permanent effect is

alteration of the bottom substrate and secondary effects related to use of the structure. As long as it is maintained, the structure will fulfill its stated purpose.

As previously stated, the terms, conditions and provisions of the NWP were developed to ensure that individual and cumulative adverse effects are minimal. Specifically, NWPs do not obviate the need for the general permittee to obtain other Federal, state or local authorizations required by law. Conditions of the NWPs also specify that it does not grant any property rights or exclusive privileges (see section 3 of this document and 33 CFR 330.4 for further information). Additional conditions, limitations, restrictions and provisions for discretionary authority as well as the ability to include activity specific or regional conditions on this NWP provide further safeguards to the aquatic environment and overall public interest. Provisions are also included to allow suspension, modification or revocation of the NWP. Refer to sections 1 and 3 of this document for further information and procedures.

No adverse impact on endangered species will be authorized by this NWP. Refer to general condition 11 and to 33 CFR 330.4(f) for information and procedures.

This NWP will not authorize the violation of and requirement to protect any marine sanctuary.

(iv) Description of the permitted activities:

As indicated by the description of the NWP in section 1 of this document and the discussion of potential impacts in section 4, the activities to be regulated by this NWP are sufficiently similar in nature and environmental impact to warrant regulation under a single general permit. The consideration of alternatives are not directly applicable to general permits.

As demonstrated by the information contained in this document as well as the terms, conditions and provisions of this NWP, actions to minimize adverse effects have been thoroughly considered and incorporated into the authorization.

(g) Endangered Species:

The Corps believes that the procedures that we have in place ensure proper coordination under Section 7 of the ESA as well as ensuring that threatened and endangered species will not be jeopardized and their critical habitat will not be destroyed. We also believe that current local procedures in Corps districts are effective in ensuring that the ESA is fully complied with under the nationwide permit program. Finally, we have incorporated several additional assurances into the program which have resulted from informal coordination with the Fish and Wildlife Service and the National Marine Fisheries Service.

Under the current Corps regulations for our NWP program (33 CFR 330.4(f)), each district must consider all information made available to it, and information that it has in its own records, to determine whether any listed threatened or endangered species or critical habitat may be affected by the action. Based upon this consideration and evaluation, the district will initiate consultation with the FWS or NMFS, as appropriate, if the district determines that the activity regulated may affect or the district determines that the action is not likely to adversely affect any endangered species. Consultation may occur under the NWP process or the district may take its discretionary authority to require an individual permit for the action and initiate consultation through the individual permit process. If the consultation is conducted under the NWP process without the district asserting its discretionary authority, then the applicant will be notified that he can not proceed until the consultation is complete. If the district determines that the activity would have no affect on any endangered species, then the district would proceed to issue the NWP authorization.

Corps districts have in most cases established informal or formal procedures with its local counterparts in the FWS and NMFS through which the agencies share information regarding endangered species. Information developed, shared and used by the local Corps and FWS/NMFS offices result in the Corps becoming aware of potential adverse affects on ESA species. In many cases maps are available on the local level that identify locations of populations

of endangered species and their critical habitat.

In addition to the procedures listed above, each NWP verification includes general condition 11 which states that "no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a critical habitat".

Also, to avoid possible confusion on the part of some applicants Condition 11 has been modified to clarify that this NWP does not authorize the taking of threatened or endangered species. This should help ensure that applicants do not mistake the Corps permit as a Federal authorization that would allow the taking of threatened or endangered species.

Based on the above the Corps has determined that this NWP will have no effect on threatened or endangered species or their critical habitat.

Although the Corps continues to believe that these existing procedures ensure that the ESA is complied with, we will take the following additional steps to provide further assurance. First, although not required to, the Corps will request programmatic formal Section 7 consultation with the FWS and NMFS as a precaution to further ensure that there is no effect. We intend that formal consultation will be concluded as soon as possible but not to exceed two years from the date of issuing the revised and reissued NWPs. Second, the Corps will direct the district offices, in writing, to meet with appropriate local representatives of the FWS and NMFS and establish or modify existing procedures to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat in its district. This will ensure that districts have the best information available to make decisions regarding whether a specific activity may affect an endangered species and thus whether or not to initiate consultation. The Corps districts can also establish through local procedures, regional conditions or other means of additional consultation for areas of higher likelihood that a permitted activity may affect an endangered species.

5. Final Determinations:

(a) Need for an environmental impact statement (FONSI):

Based upon the information contained in this document, issuance of the NWP will not have a significant impact on the

quality of the human environment and the preparation of an Environmental Impact Statement is not required.

(b) Public interest:

Based upon the information presented in this document, issuance of the NWP, as prescribed by the regulations contained in 33 CFR Parts 320 to 330, is not contrary to the public interest.

(c) Section 176(c) of the Clean Air Act General Conformity Rule Review:

The proposed NWP has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities proposed under this permit will not exceed *de minimis* levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity determination is not required for this NWP.

FOR THE COMMANDER:

/signed/
Russell L. Fuhrman
Major General, U.S. Army
Director of Civil Works